Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.

No. 88-6873

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHANDLER CLEMONS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Mississippi

BRIEF OF PETITIONER

KENNETH S. RESNICK
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200
Counsel of Record for Petitioner Chandler Clemons

Of Counsel:
M. GABRIELLE HILS
CLAIRE GRANDPRE COMBS
Dinsmore & Shohl
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Were the Eighth and Fourteenth Amendments violated by the Mississippi Supreme Court's affirmance of petitioner's death sentence on the basis of:

(1) a limiting construction of the State's "especially heinous, atrocious or cruel" aggravating circumstance that was neither charged to the sentencing jury nor meaningfully applied by the Mississippi Supreme Court itself as a restraint upon indiscriminate capital sentencing; and,

(2) a reference to the existence of a second aggravating circumstance, when neither the jury nor the Mississippi Supreme Court ever weighed the latter aggravating circumstance alone against petitioner's substantial evidence in mitigation, and when the prosecution's argument to the jury in support of death was based overwhelmingly upon the overbroad "especially heinous" aggravating circumstance and upon facts made relevant to the sentencing decision only by that circumstance?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
LIST OF PARTIES	1
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
A. THE DISCRETION OF THE SENTENCER WAS NOT CONSTITUTIONALLY CHANNELED BY THE MISSISSIPPI SUPREME COURT'S REFERENCE TO A LIMITING CONSTRUCTION OF THE "ESPECIALLY HEINOUS" AGGRAVATING FACTOR	10
1. The *Coleman* Limiting Construction Does Not Cure The Constitutionally Invalid "Especially Heinous" Aggravating Circumstance Because This Construction Was Not Charged To Petitioner's Jury	11
2. The "Especially Heinous" Aggravating Circumstance As Construed By The Mississippi Supreme Court Has Failed To Narrow Or Rationally Guide The Sentencer's Discretion	15
B. *ZANT* V. *STEPHENS* DOES NOT SAVE A DEATH SENTENCE THAT WAS THE PRODUCT OF THE SENTENCER'S CONSIDERATION OF A CONSTITUTIONALLY INVALID AGGRAVATING CIRCUMSTANCE AND WAS SUPPORTED BY OTHERWISE IRRELEVANT EVIDENCE PURSUANT TO A CAPITAL SENTENCING SCHEME IN WHICH THE SENTENCER IS SPECIFICALLY INSTRUCTED TO WEIGH STATUTORY AGGRAVATING CIRCUMSTANCES AGAINST MITIGATING CIRCUMSTANCES	19
1. The Mississippi Capital Sentencing Scheme Requires The Jury To Weigh Aggravating Against Mitigating Circumstances In Exercising Its Discretion Whether To Impose The Death Penalty	19

Table of Contents Continued

	Page
2. The Prosecution Used The Invalid Aggravating Circumstance As A Vehicle To Present Otherwise Irrelevant Evidence To The Sentencing Jury	23
C. THE MISSISSIPPI SUPREME COURT'S REFUSAL TO REMAND THIS CASE FOR RESENTENCING BEFORE A JURY VIOLATES PETITIONER'S LIFE AND LIBERTY INTERESTS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT	28
D. THE MISSISSIPPI SUPREME COURT'S REFUSAL TO REMAND THIS CASE FOR RESENTENCING BEFORE A JURY VIOLATES THE PETITIONER'S RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO HAVE THE SENTENCER CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE	33
E. THE CONSTITUTIONAL ERROR IN THE SENTENCING PHASE OF THIS CASE WAS NOT HARMLESS UNDER THE *CHAPMAN* AND *SATTERWHITE* STANDARD	40
CONCLUSION	44
APPENDIX A	1a
APPENDIX B	10a

TABLE OF AUTHORITIES

Case: **Page**

Anderson v. *Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504 (1985) 37
Ashton v. *Kentucky*, 384 U.S. 195, 86 S.Ct. 1407 (1965). 14
Baldwin v. *Alabama*, 472 U.S. 372, 105 S.Ct. 2727 (1985) 40
Barclay v. *Florida*, 463 U.S. 939, 103 S.Ct. 3418 (1983)..... 20, 25, 40
Bell v. *State*, 360 So. 2d 1306 (Miss. 1978)..... 18
Billiot v. *State*, 454 So. 2d 445 (Miss. 1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1232 (1985) 17
Booker v. *State*, 449 So. 209 (Miss. 1984), *cert. denied*, 469 U.S. 873, 105 S.Ct. 230 (1984), *cert. granted and judgment vacated*, 472 U.S. 1023, 105 S.Ct. 3493 (1985) 18
Booth v. *Maryland*, 482 U.S. 496, 107 S.Ct. 2529 (1987) 38
Bullock v. *State*, 391 So. 2d 601 (Miss. 1980), *cert. denied*, 452 U.S. 931, 101 S.Ct. 3068 (1981)..... 17, 43
Bullock v. *State*, 525 So. 2d 764 (Miss. 1987)..... 42, 43
Cabana v. *Bullock*, 474 U.S. 376, 106 S.Ct. 689 (1986)..... 24, 37
Cabello v. *State*, 471 So. 2d 332 (Miss. 1985)..... 17
Caldwell v. *Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985) 38
California v. *Ramos*, 463 U.S. 992, 103 S.Ct. 3446 (1983) 41
Chapman v. *California*, 386 U.S. 18, 87 S.Ct. 824 (1967)..... 9, 40
Clemons v. *State*, 535 So. 2d 1354 (Miss. 1988), *cert. granted in part*, ___ U.S. ___, 109 S.Ct. 3184 (1989)..... *passim*
Coleman v. *State*, 378 So. 2d 640 (Miss. 1979)..... *passim*
Collins v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546 (1985) 22
Eddings v. *Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982)..... 34, 38
Edwards (Hezekiah) v. *State*, 441 So. 2d 84 (Miss. 1983) 16
Edwards (Leo) v. *State*, 413 So.2d 1007 (Miss. 1982), *cert. denied*, 459 U.S. 928, 103 S.Ct. 239 (1982) 18
Enmund v. *Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982)..... 37, 42
Evans v. *State*, 422 So. 2d 737 (Miss. 1982), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111 (1983) 18

Table of Authorities Continued

Page

Furman v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972) . 11
Gardner v. *Florida*, 430 U.S. 349, 97 S.Ct. 1197 (1977).. 19, 29
Gathers v. *South Carolina*, ___ U.S. ___, 109 S.Ct. 2207 (1989)..... 24, 27
Gavin v. *State*, 473 So. 2d 952 (Miss. 1985)..... 39
Godfrey v. *Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980)..... *passim*
Gray (Jimmy Lee) v. *State*, 375 So. 2d 994 (Miss. 1979), *cert. denied*, 446 U.S. 988, 100 S.Ct. 2975 (1980)... 17
Greenholtz v. *Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100 (1979) 30
Gregg v. *Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976). 10, 11, 14
Hall v. *State*, 427 So. 2d 957 (Miss. 1983) 37
Hicks v. *Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227 (1980)..... 29, 30, 32
Hill v. *State*, 432 So. 2d 427 (Miss. 1983), *cert. denied*, 464 U.S. 977, 104 S.Ct. 414 (1983)..... 37
Hitchcock v. *Dugger*, 481 U.S. 393, 107 S.Ct. 1821 (1987) 34
Irving v. *State*, 441 So. 2d 846 (Miss. 1983), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1774 (1985)..... 17, 18
Irving v. *State*, 498 So. 2d 305 (Miss. 1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986 (1987), *rehearing denied*, 482 U.S. 921, 107 S.Ct. 3200 (1987) 18
Johnson (Samuel) v. *Mississippi*, ___ U.S. ___, 108 S.Ct. 1981 (1988)..... 31, 41
Johnson (Samuel) v. *State*, 477 So. 2d 196 (Miss. 1985), *cert. denied*, 476 U.S. 1109, 106 S.Ct. 1958 (1986), *rehearing denied*, 476 U.S. 1189, 106 S.Ct. 2930 (1986)..... 16, 36
Johnson (Samuel Bice) v. *Mississippi*, 511 So. 2d 1333 (Miss. 1987)..... 9, 41, 42
Johnson (Samuel) v. *State*, DP-43, slip op., (Miss. July 18, 1989)..... 32, 33, 36, 42
Johnson (Edward Earl) v. *State*, 416 So. 2d 383 (Miss. 1982)..... 17
Johnson v. *Thigpen*, 806 F.2d 1243 (5th Cir. 1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1618 (1987) 16
Jones (Larry) v. *State*, 381 So. 2d 983 (Miss. 1980), *cert. denied*, 449 U.S. 1003, 101 S.Ct. 543 (1980) 17

Table of Authorities Continued

Page

Jones (Gregory) v. *State*, 517 So. 2d 1295 (Miss. 1987), *vacated*, *Jones* v. *Mississippi*, ___ U.S. ___, 108 S.Ct. 2891 (1988) 17

Jordan v. *State*, 464 So. 2d 475 (Miss. 1985), *cert. granted and judgment vacated*, 476 U.S. 1101, 106 S.Ct. 1942 (1986) 18

Jurek v. *Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976) 11

Leatherwood (Alfred) v. *State*, DP-70 (Miss. July 19, 1989) 18

Leatherwood (Michael) v. *State*, 539 So. 2d 1378 (Miss. 1989) 36

Lockett v. *Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978) 33, 38

Lowenfield v. *Phelps*, ___ U.S. ___, 108 S.Ct. 546 (1988) 11, 12

Maynard v. *Cartwright*, ___ U.S. ___, 108 S.Ct. 1853 (1988) ..... *passim*

Mhoon v. *State*, 464 So. 2d 77 (Miss. 1985) 12, 37

Morrissey v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972) 30

Penry v. *Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989) 34

Pinkney v. *State*, 538 So. 2d 329 (Miss. 1988), *petition for cert. filed* (May 12, 1989) 13, 36

Pinkton v. *State*, 481 So. 2d 306 (Miss. 1985) 33, 37

Proffitt v. *Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976) .. 11

Satterwhite v. *Texas*, 486 U.S. 249, 108 S.Ct. 1792 (1988) 9, 41, 42, 43

Shuttlesworth v. *Birmingham*, 382 U.S. 87, 86 S.Ct. 211 (1965) 14

Skipper v. *South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986) 29

Spaziano v. *Florida*, 468 U.S. 447, 104 S.Ct. 3154 (1984) 11, 39

State v. *Biegenwald*, 96 N.J. 630, 477 A.2d 318 (1984) .. 22

State v. *Davis*, 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988) *cert. denied*, ___ U.S. ___, 109 S.Ct. 849 (1989).. 22

Vitek v. *Jones*, 445 U.S. 480, 100 S.Ct. 1254 (1980) 30

Voyles v. *State*, 362 So. 2d 1236 (Miss. 1978) 17

Wainwright v. *Witt*, 469 U.S. 412, 105 S.Ct. 844 (1985) . 37

Wiley v. *State*, 449 So. 2d 756 (Miss. 1984) 29, 39

Table of Authorities Continued

Page

Wiley v. *State*, 484 So. 2d 339 (Miss. 1986), *cert. denied*, 479 U.S. 906, 107 S.Ct. 304 (1986) 16, 17, 18

Williams (Daniel) v. *State*, No. DP-56 (Miss. June 21, 1989) 29

Williams v. *State*, 274 Ark. 9, 621 S.W.2d 686 (1981), *cert. denied*, 459 U.S. 1042, 103 S.Ct. 460 (1983) 22

Williams (Walter) v. *State*, 445 So. 2d 798 (Miss. 1984), *cert. denied*, 469 U.S. 1117, 105 S.Ct. 803 (1985). 12, 29

Wolff v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974). 30

Zant v. *Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983) ..... *passim*

Statutes and Rules:

28 U.S.C. section 1257(a) 2

First Amendment 13

Eighth Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

Miss. Code Ann. § 97-3-19 (Supp. 1988) 3

Miss. Code Ann. § 99-19-101 (Supp. 1988) ..... *passim*

Miss. Code Ann. § 99-19-103 (Supp. 1988) 3, 36

Miss. Code Ann. § 99-19-105 (Supp. 1988) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-6873

CHANDLER CLEMONS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Mississippi

BRIEF OF PETITONER

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Mississippi is reported as *Clemons* v. *Mississippi*, 535 So. 2d 1354 (Miss. 1988), *cert. granted in part*, ___ U.S. ___, 109 S.Ct. 3184 (1989) and is reprinted in the Joint Appendix ("J.A.") at 29. The notation entry denying petitioner's Petition for Rehearing in the Mis-

sissippi Supreme Court is dated December 21, 1988 and is reprinted in J.A. 66.

JURISDICTION

The jurisdiction of this Court is invoked by the petitioner under 28 U.S.C. section 1257(a), having asserted in the Supreme Court of Mississippi deprivation of his rights under the United States Constitution. The judgment of the Supreme Court of Mississippi was entered on November 30, 1988. The petitioner's Petition for Rehearing filed with that court was denied by notation entry on December 21, 1988. On February 13, 1989, the Honorable Associate Justice Byron R. White extended the time for filing the petition for writ of certiorari to and including March 21, 1989. The Petition for Writ of Certiorari to the Mississippi Supreme Court was filed on March 21 and was timely under Rule 20.1., Rules of the Supreme Court of the United States. The Petition for Writ of Certiorari was granted by an Order filed on June 19, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth and Fourteenth Amendments to the United States Constitution.

EIGHTH AMENDMENT:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT, SECTION 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Mississippi Code sections 97-3-19, 99-19-101, 99-19-103, 99-19-105, which are set forth in their entirety in Appendix A to this brief.

STATEMENT OF THE CASE

On the evening of April 17, 1987, Anthony Calvin ("Calvin"), while shopping with his mother at a grocery in Vicksburg, Mississippi, met a friend, Darwin Hunter. Calvin decided to leave the grocery and ride with Hunter in his car. (R. 858). Around 6 p.m. that evening, they picked up Chandler Clemons ("Clemons") at his home and then drove to Antonio Hay's ("Hay") home. When Hay joined them, he was carrying a sawed-off shotgun in his jacket and he put the gun under the front seat of the car. (R. 913-14). The group then picked up another friend and drove to a party. (R. 987).

Later that evening, Calvin, Hay and Clemons borrowed Hunter's automobile. (R. 990). At about 10:30 that night, one of the three ordered a pizza to be delivered to a nearby apartment. (R. 752-53). They drove to the apartment complex and waited for the pizza delivery man to arrive. They stopped the delivery man at the entrance to the complex, robbed and shot him with Hay's shotgun. (R. 766). The three drove away from the scene. (R. 993-94). There were, apparently, no other witnesses to the killing.

The next day, Calvin was arrested by the county sheriff. Clemons called the sheriff and was picked up later that afternoon. (R. 773). After waiving his right to counsel, Clemons gave a statement to the sheriff naming Calvin as the triggerman in the killing. (R. 982-87). Two days later, Calvin gave a statement naming Clemons as the killer. (R. 897-98). Calvin, Clemons and Hay were indicted by a Warren County grand jury for the capital murder of the pizza delivery man. (J.A. 5). The trial court severed these cases for separate trials. (J.A. 1). In addition, the court granted a request for a change of venue because of extensive pretrial publicity in Warren County, Mis-

sissippi. (J.A. 1). The trial began on August 5, 1987 in Harrison County, Gulfport, Mississippi. (R. 698).

The Guilt-Innocence Trial

At trial, the prosecution relied exclusively upon the testimony of Calvin to identify Clemons as the triggerman. A week before the trial started, Calvin and the State entered into an agreement that:

- Calvin would testify at any hearing or trial when the State so requests;
- any testimony given by Calvin could not be used against him in his own trial; and,
- the State would not seek the death penalty against Calvin in his upcoming trial for capital murder.

(R. 891-92). Consistent with his prior statement, Calvin testified that Clemons actually killed the victim and had planned and participated in the robbery. (R. 875-76).

Clemons was the sole witness for the defense. Clemons testified that he had no prior knowledge of a plan to rob or to kill the victim. (R. 997, 1000-01). He testified, consistent with his prior statement, that Calvin shot the victim. (R. 993). Clemons' fingerprints were not found on the shotgun. (R. 505, 831-33).

The trial lasted two and a half days. The court instructed the jury that Clemons could be found guilty of capital murder—though he had no intent to kill—if the killing was done in the perpetration of a robbery. The court also instructed the jury that this phase of the trial did not involve the determination of punishment. (J.A. 9, 11). The jury found Clemons guilty of capital murder as charged in the indictment. (J.A. 8).

Sentencing Trial

The sentencing phase of the trial commenced shortly after the guilty verdict was returned. Clemons presented the testimony of his mother Rebecca Clemons, and that of Charlton

Stanley, Ph.D., a psychologist who had examined Clemons. The evidence from the guilt and sentencing phase supported the following mitigating factors: At the time of his offense, Clemons had just turned eighteen years of age (R. 1149); Clemons had no prior criminal history in Mississippi or elsewhere (R. 1113); Clemons had a good chance of benefiting from a rehabilitation program (R. 1125, 1153-54); Clemons had expressed remorse for his involvement in the crime (R. 1112-13); Clemons was a chronic abuser of alcohol and chemical substances (R. 1115, 1124-25, 1149-51); Clemons was acting under the influence of drugs and alcohol at the time of his crime (R. 1112); Clemons had suffered organic brain damage which had impaired his judgment (R. 1125); Clemons voluntarily turned himself in to the sheriff when he heard that the sheriff wanted to see him (R. 1112); Clemons voluntarily cooperated with the sheriff's investigation (R. 986). The prosecution offered no additional evidence at the sentencing hearing, choosing instead to rely upon argument to the jury. (R. 1100-01).

In accordance with Mississippi law, the trial court instructed the jury to weigh any aggravating circumstances it found beyond a reasonable doubt against any mitigating circumstances. (J.A. 18, 24-26). Even if one or more aggravating circumstances was found to exist, the jury was instructed that it could impose the death penalty only if those circumstances outweighed any mitigating circumstances. (J.A. 21, 24-26). The trial court instructed the jury that it could consider only two aggravating circumstances: 1) that the murder occurred during the course of a robbery; and, 2) that the crime was especially heinous, atrocious or cruel. The trial court did not give the jury any instruction limiting the reach of the "especially heinous" aggravating circumstance.

This aggravating factor was argued by the prosecution to the virtual exclusion of the other. (R. 1163-69, 1190-98). In support of this argument, the prosecution marshalled facts and evidence regarding sympathetic personal characteristics and his-

tory of the victim that was not in any way relevant to the sentencing determination, except under the sweeping and unlimited terms of the "especially heinous" aggravating circumstance.

The jury's deliberations began on the afternoon of August 7, 1987. On August 8, 1987, the jury returned a verdict of death. The jury found both aggravating circumstances and further determined that there were insufficient mitigating circumstances to outweigh the two aggravating circumstances. (J.A. 28). However, the jury rejected the prosecutor's theory and evidence that Clemons killed the victim. Instead of finding that Clemons actually killed, or even intended to kill, the jury found only that Clemons contemplated that lethal force would be used. (J.A. 28). Clemons was sentenced to die on September 18, 1987.[1] (R. 1253).

The Appeal

On March 29, 1988, Clemons filed his brief in the Supreme Court of Mississippi. While the appeal was pending, this Court held in *Maynard* v. *Cartwright*, ___ U.S. ___, 108 S.Ct. 1853 (1988) that Oklahoma's "especially heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague. The identical aggravating circumstance is contained in the Mississippi capital sentencing statute that was charged to and found by the jury in this case without the benefit of any narrowing construction. The Mississippi Supreme Court requested the State and Clemons to file supplemental briefs on the following two issues:

[1] Calvin and Hay were tried after Clemons. Calvin was acquitted of capital murder. *State* v. *Calvin*, No. 8587, Circuit Court of Adams County, Mississippi (September 22, 1987). Hay was found guilty of capital murder, but was sentenced by the jury to life imprisonment. *State* v. *Hay*, No. 10,684, Circuit Court of Lincoln County, Mississippi (August 13, 1987). A certified copy of the judgment in these two cases has been lodged with the Clerk of this Court.

1. In the event an aggravating circumstance is found to be invalid, what is the effect, if any, on a jury verdict of death?

2. To what extent, if any, does *Maynard* v. *Cartwright*, ___ U.S. ___, 108 S.Ct. 1853 (1988), have on [this] case?

(J.A. 3). Clemons filed his supplemental brief on October 17, 1988.

On November 30, 1988, the Mississippi Supreme Court, over the opinions of three dissenting justices, overruled all assignments of error and affirmed the sentence of death, holding that *Maynard* v *Cartwright* did not dictate the outcome of this case. On December 19, 1988, the court granted Clemons' motion for a stay of execution "pending disposition of his petition for certiorari to the United States Supreme Court and petition for rehearing filed before this court." Clemons' Petition for Rehearing was denied by notation entry on December 21, 1988. Clemons filed his petition for writ of certiorari in this Court on March 21, 1989. On June 19, 1989, this Court granted certiorari limited to the first question presented in the petition.

SUMMARY OF THE ARGUMENT

The petitioner's death sentence rests upon a sentencing procedure that unquestionably failed to channel the unbridled discretion of the sentencer and thus narrow the class of defendants eligible for the death penalty, and an appellate proceeding that compounded, rather than cured the original error. The sentencing jury did not receive an instruction that narrowed the unconstitutionally vague "especially heinous, atrocious or cruel" aggravating factor as required by this Court's holding in *Maynard* v. *Cartwright*. The Mississippi Supreme Court attempted to save the sentence of death by invoking in the first instance a limiting construction of the "especially heinous" circumstance and by asserting that the single remaining aggravating circumstance was sufficient to support the death sentence.

This Court, however, has consistently held that it is the discretion of the sentencing authority that must be channeled and limited. This constitutional requirement is not satisfied unless the narrowing construction is charged to the sentencing jury, and that was not done here. Moreover, the limiting construction previously adopted by the Mississippi Supreme Court has not been applied consistently and in a fashion serving to meaningfully narrow or rationally guide the jury's sentencing discretion. Thus, notwithstanding this limiting construction, the "especially heinous" aggravating circumstance has become a "catch-all" standard in Mississippi and cannot constitutionally contribute to the imposition of a death sentence.

The death sentence cannot be upheld on the basis of *Zant* v. *Stephens*, in which this Court did not express any opinion concerning the invalidation of an aggravating circumstance under a statutory scheme such as Mississippi's in which the sentencer is specifically instructed to weigh aggravating against mitigating circumstances. In this case the jury was instructed at least fourteen times to weigh aggravating against mitigating circumstances. Under Mississippi law, the finding of one or more aggravating circumstances is not sufficient to impose the death penalty—the jury must further find that there are insufficient mitigating circumstances to outweigh any such aggravating circumstances. Moreover, here, unlike *Zant*, the prosecution used the unconstitutionally vague "especially heinous" aggravating circumstance as a vehicle to argue evidence to the jury that otherwise would not have been relevant to the capital sentencing determination. This evidence, primarily relating to the character of the victim, was made relevant only by the broadest possible, and hence constitutionally impermissible, interpretation of the "especially heinous" aggravating circumstance.

The Mississippi Supreme Court's decision deprived petitioner of his right under the Due Process Clause to be sentenced by a jury, the sole and exclusive capital sentencing

authority under Mississippi law. Stripped of the weight of the overbroad "especially heinous" aggravating circumstance and the irrelevant evidence that accompanied it, only a jury, and not the Mississippi Supreme Court, could lawfully determine whether the scales would have shifted toward life.

In affirming the death sentence based upon the remaining aggravating factor, the Mississippi Supreme Court did not and could not consider or give effect to the substantial evidence petitioner presented to the jury in mitigation. Under Mississippi law, the jury makes no express findings regarding the mitigation evidence; they are entirely subsumed in the weighing and balancing process. The Mississippi Supreme Court has steadfastly refused to make the type of credibility and factual determinations that under the state capital sentencing statute are exclusively within the province of the jury. Accordingly, the court focused only on the aggravation side of the scale in upholding the death penalty. This process is fundamentally inconsistent with petitioner's Eighth Amendment right to consideration of mitigating evidence by sentencers who were present to hear the evidence and argument and see the witnesses.

Finally, the constitutional error in the sentencing phase of this case was not harmless under this Court's decision in *Satterwhite*. The finding of an additional aggravating circumstance is critical under a capital sentencing scheme such as Mississippi's in which aggravating and mitigating circumstances are weighed against each other. In this case, as in *Chapman* v. *California*, *Satterwhite* v. *Texas* and *Johnson* v. *Mississippi*, the prosecution relied heavily on the invalid aggravating circumstance in urging the sentencing jury to return a verdict of death. Moreover, in this case the prosecution was able to marshall additional evidence in support of the death penalty that was made relevant only by the unconstitutional breadth of the "especially heinous" aggravating circumstance. The petitioner presented substantial evidence in mitigation that—in the absence of the constitutional error—could very well have tipped the scales in the other direction. The state has not proved

beyond a reasonable doubt that the constitutional error committed in this case did not contribute to the verdict of death.

ARGUMENT

A. THE DISCRETION OF THE SENTENCER WAS NOT CONSTITUTIONALLY CHANNELED BY THE MISSISSIPPI SUPREME COURT'S REFERENCE TO A LIMITING CONSTRUCTION OF THE "ESPECIALLY HEINOUS" AGGRAVATING FACTOR.

The Mississippi Supreme Court acknowledged that in the absence of a limiting construction, Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance failed to channel capital sentencing discretion as required by *Maynard* v. *Cartwright*, ___ U.S. ___, 108 S.Ct. 1853 (1988). *Clemons* v.*State*, 535 So. 2d 1354, 1362 (Miss. 1988), *cert. granted in part*, ___ U.S. ___, 109 S.Ct. 3184 (1989). Nevertheless, the court upheld petitioner's death sentence, imposed by a jury instructed only in the unlimited terms of the "especially heinous" clause, by adverting to a restrictive interpretation of this clause which it had supplied in *Coleman* v. *State*, 378 So. 2d 640 (Miss. 1979). The Mississippi Supreme Court wrote:

> The United States Supreme Court in *Maynard* v. *Cartwright* held that the 'especially heinous, atrocious or cruel' aggravating circumstance left the jury with unchanneled discretion and that the Oklahoma court had never adopted a limiting construction of 'especially heinous, atrocious or cruel.' Not so in Mississippi. This Court has placed a limiting construction on 'especially heinous, atrocious or cruel.'

Clemons, 535 So. 2d at 1363. Specifically, it noted that *Coleman* construed this language to mean "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Id.*

The Mississippi court's efforts to distinguish, and, in fact, limit *Maynard* fall short, however, for two reasons: 1) since *Gregg* v. *Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), this Court has insisted that the standards employed by the states to channel the discretion of the jury and narrow the class of defendants eligible for the death penalty be communicated to the sentencing authority; and, 2) the limiting construction adopted by the Mississippi Supreme Court in *Coleman* has not been applied consistently and does not, in fact, serve either the narrowing or channeling function required by the federal Constitution.

1. The *Coleman* Limiting Construction Does Not Cure The Constitutionally Invalid "Especially Heinous" Aggravating Circumstance Because This Construction Was Not Charged To Petitioner's Jury.

Since *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972), this Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard*, ___ U.S. at ___, 108 S.Ct. at 1858 (citing *Gregg* v. *Georgia*, 428 U.S. at 189, 206-07, 96 S.Ct. at 2940-41 (1976); *Spaziano* v. *Florida*, 468 U.S. 447, 462, 104 S.Ct. 3154, 3163 (1984); and *Lowenfield* v. *Phelps*, ___ U.S. ___, 108 S.Ct. 546, 554 (1988)). As this Court wrote in *Godfrey* v. *Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980):

> Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless' [sentencing] discretion. *Gregg* v. *Georgia*, *supra*, at 196 n. 47. *See also*, *Proffitt* v. *Florida*, 428 U.S. 242; *Jurek* v. *Texas*, 428 U.S. 262. It must channel the sentencer's discretion by 'clear and objective standards' that provide specific and detailed guidance and 'that make rationally reviewable the process for imposing a sentence of death.'

Id. at 428, 100 S.Ct. at 1764-65 (footnotes omitted).

In Mississippi, the responsibility for determining the appropriateness of the death penalty rests solely with the jury. The Mississippi Supreme Court neither has the power to determine the appropriateness of a death sentence in the first instance nor

did it undertake to do so in this case. As that court has written: "[t]he structure of the capital sentencing system enacted by our Legislature places the entire sentencing burden on the jury. No judge or other official within our system has the power to impose the sentence of death; only the jury." *Williams* v. *State*, 445 So. 2d 798, 811 (Miss. 1984), *cert. denied*, 469 U.S. 1117, 105 S.Ct. 803 (1985).

Mississippi has chosen to fulfill its constitutional requirement of channeling and limiting the sentencer's discretion by adopting standards in the form of "aggravating circumstances." Miss. Code Ann. § 99-19-101(5) (Supp. 1988). As this Court noted in *Lowenfield*, ___ U.S. at ___, 108 S.Ct. at 554, "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." In *Zant* v. *Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742 (1983), this Court observed that "an aggravating circumstance must *genuinely* narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."

In the wake of *Godfrey*, the Mississippi Supreme Court underscored the federal constitutional requirement of providing the sentencing authority with a limiting construction of the "especially heinous" aggravating circumstance. In *Mhoon* v. *State*, 464 So. 2d 77 (Miss. 1985), the Mississippi Supreme Court emphasized:

> Absent a requirement that the jury be instructed as to the specific meaning of 'especially heinous, atrocious or cruel,' the mandate of *Godfrey* is not met since (a) jurors are unlikely to have had previous sentencing experience and (b) the statutory language 'heinous, atrocious or cruel' has been given a variety of interpretations by different states.

Id. at 85. Although the death sentence was vacated on other grounds, the Mississippi Supreme Court went out of its way to

admonish the state court bench that—in light of *Godfrey*—"a jury considering whether to impose the death penalty on the basis of the aggravating circumstance 'especially heinous, atrocious or cruel' should be informed of the construction given that language by this Court in *Coleman* . . ."[2] *Id.*

In this case, the Mississippi Supreme Court ignored its own advice. It affirmed petitioner's death sentence although the jury was not instructed in terms of *Coleman*, but only in the unrestricted statutory language "especially heinous, atrocious or cruel." The court's departure—not merely from its past practice, but more importantly from federal constitutional law as expressed in *Godrey* and *Maynard* —was noted by the dissent:

> [U]nder our system the Circuit Court jury is the factfinder and the sentencer, not this Court. Thus, it matters not whether *we* correctly understand the law as mandated by *Cartwright* and *Coleman*. The body that must under the Eighth Amendment understand that law is the *jury*—the body which performs the functions of finding aggravating circumstances, of weighing and balancing those circumstances against mitigating circumstances, and of returning the verdict of life or death.

Clemons, 535 So. 2d at 1369 (Robertson, Prather, JJ., dissenting).

An overbroad aggravating circumstance is constitutionally deficient under the Eighth Amendment for the same reasons a vague or overbroad law violates the First Amendment—in both instances the decision-maker exercises unbridled discre-

---

[2] In a case decided while Clemons' Petition for Rehearing was pending, the Mississippi Supreme Court emphatically stated that "*Maynard* v. *Cartwright* dictates that our capital sentencing juries in this State be more specifically instructed on the meaning of 'especially heinous, atrocious or cruel.'" *Pinkney* v. *Mississippi*, 538 So. 2d 329, 357 (Miss. 1988), *petition for cert. filed* (May 12, 1989). The court upheld the death sentence, but acknowledged that it was federal constitutional error for the jury to consider the "especially heinous" aggravating circumstance without a limiting instruction. *Id.* at 355.

tion. *Cf. Maynard*, ___ U.S. at ___, 108 S.Ct. at 1858. As this Court has held on numerous occasions, this constitutional infirmity can be cured only by providing the trier of fact, whether it be the trial court or jury, with a proper narrowing construction. In *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 86 S.Ct. 211 (1965), this Court reversed a conviction under a vague city ordinance notwithstanding the fact that the state appellate court, on direct review, had "applied its narrowed construction of the [statute] in affirming [defendant's] conviction." *Id.* at 92, 86 S.Ct. at 214. This Court found that the trial court "was without guidance" as to the meaning of the ordinance in question. *Id.* In the same term, this Court reiterated "[w]here an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act." *Ashton* v. *Kentucky*, 384 U.S. 195, 198, 86 S.Ct. 1407, 1409 (1965).

The essence of *Godfrey* and *Maynard*, as explained in the latter case, is the "fundamental constitutional requirement" that the discretion of the sentencing authority be channeled and limited. Under a sentencing procedure that relies upon the jury to decide whether the defendant should live or die, this requirement is not satisfied unless the standards necessary to channel the life or death decision are charged to the jury.[3] As

[3] The inadequacy of permitting an appellate court to perform the constitutionally required narrowing and channeling function was identified in *Godfrey*:

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards. See *ante*, at 428. To give the jury an instruction in the form of the bare words of the statute—words that are hopelessly ambiguous and could be understood to apply to any murder, *see ante*, at 428-429; *Gregg* v. *Georgia*, 428 U.S., at 201—would effectively grant it unbridled discretion to impose the death penalty. Such a defect could not be cured by the *post hoc* narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437, 100 S. Ct. at 1769 (Marshall, J., concurring).

the dissent emphasized below: "*Cartwright* teaches that *Coleman* is not worth the paper it is written on if it isn't communicated to the sentencing jury—and it wasn't here."[4] *Clemons*, 535 So. 2d at 1368 (Robertson, Prather, JJ., dissenting).

2. The "Especially Heinous" Aggravating Circumstance As Construed By The Mississippi Supreme Court Has Failed To Narrow Or Rationally Guide The Sentencer's Discretion.

Mississippi "has a constitutional responsibility to tailor and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428, 100 S. Ct. at 1764 (emphasis added). A review of the Mississippi cases in which the "especially heinous" aggravating circumstance was found by the sentencing jury and subsequently affirmed on appeal demonstrates that this solemn responsibility has not been discharged.

Since 1977, the year Mississippi's capital sentencing scheme was enacted, there have been 71 cases in which the death penalty has been imposed. In 68 of those cases, the sentencing jury was instructed to consider the "especially heinous" aggravating circumstance. In all but 4 cases, the jury found this aggravating circumstance to be present. Furthermore, since *Coleman*, the Mississippi Supreme Court has not disturbed a jury's finding of the "especially heinous" aggravating circumstance in each of the remaining 64 cases.[5] These numbers strongly intimate—but do not fully reveal—the utterly meaningless fashion in which this circumstance has been applied in Mississippi.

[4] The record shows that no limiting construction of the "especially heinous" aggravating circumstance was given to the sentencing jury in this case. Nevertheless, the majority concluded its discussion of the *Maynard* issue by stating "considering . . . the narrowing instructions given to the jury by the lower court . . . it is inescapable that *Maynard* v. *Cartwright* does not dictate the outcome of the case *sub judice*." *Clemons*, 535 So. 2d at 1364. It is, however, indisputable that the sentencing jury was not provided with any limiting construction of the "especially heinous" aggravating circumstance.

[5] *See* Appendix B to this brief.

The Court of Appeals for the Fifth Circuit had no trouble concluding in 1986 that "the Mississippi Supreme Court has not consistently applied its *Coleman* limiting construction of the especially heinous aggravating circumstance." *Johnson* v. *Thigpen*, 806 F.2d 1243 (5th Cir. 1986), *cert. denied*, 480 U.S. 951, 107 S. Ct. 1618 (1987). That court was compelled to write "the limiting construction . . . adopted in *Coleman* appears now to be more honored in breach than observance." *Id.* at 1247. These conclusions were based upon a review of Mississippi case law, which showed that "in *no reported case has the Mississippi Supreme Court ever found the evidence insufficient to support the especially heinous aggravating circumstance*. Indeed, the court has rejected several attempts to have it limit application of the aggravating circumstance. *See Wiley*, 484 So. 2d at 352-54; *Edwards [Hezekiah]* v. *State*, 441 So. 2d 84, 92 (Miss. 1983)." *Id.* (emphasis added).

In *Wiley* v. *State*, 484 So. 2d 339 (Miss. 1986), *cert. denied*, 479 U.S. 906, 107 S.Ct. 304 (1986), Justice Robertson looked at the history of the "especially heinous" aggravating circumstance in Mississippi and took stock:

> We went astray when we failed almost from the outset to afford any practical meaning to the critical word of the statute: 'especially.' Put another way, we have allowed to creep into our juridical thinking the layman's intuitively correct notion that every murder is, by definition, 'heinous, atrocious or cruel.' *See Johnson* v. *State*, 477 So. 2d 196, 217 (Miss. 1985). Indeed, if a killing is one a layman would not describe by one or more of these adjectives, it would almost surely not be murder.

Id. at 359 (Robertson, J., dissenting). As Justice Robertson's dissent indicates, the especially heinous aggravating circumstance, "though designed to narrow the jury's focus, in fact does no narrowing at all."[6] *Id.* Mississippi jurors "demonstrably have misunderstood the statutory language[,] . . . ignored the law and acted upon the layman's intuitive notion that all murders are heinous, atrocious or cruel. There is no evidence that this aggravating circumstance has in any way served to narrow or guide rationally the jury's sentencing discretion." *Id.* A cursory examination of the case law amply illustrates this point.

The Supreme Court of Mississippi has affirmed an "especially heinous" finding in cases where the victim has suffered a painful, lingering death.[7] However, this feature of these cases has not served to narrow the "especially heinous" aggravating circumstance because a finding of the circumstance has also been approved by the Mississippi Supreme Court in cases where the victim died instantly.[8] The Mississippi Supreme Court has approved an "especially heinous" finding in cases where the victim was mentally tortured by fear

---

[6] In *Wiley*, Justice Robertson also reviewed the startling rate at which the Mississippi Supreme Court simply affirmed the "especially heinous" finding:

> On more than one occasion members of the Court have asked counsel for the State in the course of oral argument to name or describe a capital murder case that the State would concede is not 'especially heinous, atrocious or cruel'. Out of the 50 or so capital murder cases we have seen in this state, counsel have never been able to mention more than one or two. The State's brief in the case at bar inadvertently confesses the point when it itemizes at least 20 separate occasions wherein this Court had ratified 'especially heinous, atrocious or cruel' jury findings. *See* Brief for Appellee, filed July 11, 1985, pp. 13-15. Every case is especially heinous, atrocious or cruel, or at least we refuse to vacate the findings which in the aggregate have so held.

484 So. 2d at 359 (Robertson, J., dissenting) (footnote omitted). Obviously, the Mississippi Supreme Court's practice of affirming the "especially heinous" aggravating circumstance has not changed since *Wiley* was decided.

[7] *See, e.g., Cabello* v. *State*, 471 So. 2d 332 (Miss. 1985); *Billiot* v. *State*, 454 So. 2d 445 (Miss. 1984), *cert. denied*, 469 U.S. 230, 105 S.Ct. 1232 (1985); *Bullock* v. *State*, 391 So. 2d 601(Miss. 1980), *cert. denied*, 452 U.S. 931, 101 S.Ct. 3068 (1981); *Jones (Larry)* v. *State*, 381 So. 2d 983 (Miss. 1980), *cert. denied*, 449 U.S. 1003, 101 S.Ct. 543 (1980); *Gray (Jimmy Lee)* v. *State*, 375 So.2d 994 (Miss. 1979), *cert. denied*, 446 U.S. 988, 100 S.Ct. 2975 (1980); *Voyles* v. *State*, 362 So. 2d 1236 (Miss. 1978).

[8] *See, e.g., Jones (Gregory)* v. *State*, 517 So. 2d 1295 (Miss. 1987), *vacated*, *Jones* v. *Miss.*, ____ U.S. ____, 108 S. Ct.289 (1988); *Irving* v. *State*, 441 So. 2d 846 (Miss. 1983), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1774 (1985); *Johnson (Edward Earl)* v. *State*, 416 So. 2d 383 (Miss. 1982).

of impending death.[9] Yet, conversely the Mississippi Supreme Court has approved the "especially heinous" aggravating circumstance in cases where little, if any, warning was given to the victim.[10] The application of this aggravating circumstance seems to have no boundaries — the "especially heinous" aggravating factor has been found in a capital rape case that did not involve the death of the victim or the use of a weapon. *Leatherwood (Alfred)* v. *State*, DP-70 (Miss. July 19, 1989) (reversed on other grounds).[11] Moreover, in approving the jury's finding of the "especially heinous" aggravating circumstance in *Irving* v. *State*, 498 So. 2d 305, 314 (Miss. 1986), *cert. denied*, 481 U.S. 1042, 107 S. Ct. 1986 (1987), *rehearing denied*, 482 U.S. 921, 107 S. Ct. 3200 (1987), the Mississippi Supreme Court relied upon the "heinous" facts in *Edwards (Leo)* v. *State*,413 So. 2d 1007 (Miss. 1982), *cert. denied*, 459 U.S. 928, 103 S. Ct. 239 (1982), a case in which this aggravating circumstance was neither submitted to nor found by the jury. Notwithstanding the limiting construction adopted in *Coleman*, the "especially heinous" aggravating circumstance has become a "catch-all" standard in Mississippi. *See Godfrey*, 446 U.S. at 429, 100 S.Ct. at 1765. For this reason, the Mississippi Supreme Court's reference to the supposed limitation of the "especially heinous" aggravating circumstance in *Coleman* cannot constitutionally save the death sentence in *Clemons*.[12]

---

[9] *See, e.g., Jordan* v. *State*, 464 So. 2d 475 (Miss. 1985), *cert. granted and judgment vacated*, 476 U.S. 1101, 106 S.Ct. 1942(1986); *Evans* v. *State*, 422 So. 2d 737 (Miss. 1982), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111 (1983); *Bell* v. *State*, 360 So. 2d 1206 (Miss. 1978).

[10] *See, e.g., Wiley* v. *State*, 484 So. 2d 339 (Miss. 1986); *Booker* v. *State*, 449 So. 2d 209 (Miss. 1984), *cert. denied*, 469 U.S. 873, 105 S.Ct. 230 (1984), *cert. granted and judgment vacated*, 472 U.S. 1023, 105 S.Ct. 3493 (1985); *Irving* v. *State*, 441 So. 2d 846 (Miss. 1983).

[11] A copy of this opinion has been lodged with the Clerk of this Court.

[12] This Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." *Maynard*, ____ U.S. at ____, 108 S.Ct. at 1859. Likewise, this Court rejected the contention that "there are factual circumstances that so plainly characterize the killing as 'especially heinous, atrocious or cruel' that affirmance of the death penalty is proper." *Id.* at ____,108 S. Ct. at 1857. For example, in *Godfrey* a review of the facts showed:

> The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts. But, as was said in *Gardner* v. *Florida*, 430 U.S. 349, 358, it 'is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'

Godfrey, 446 U.S. at 433, 100 S.Ct. at 1767 (footnote omitted). Clemons, unlike Godfrey, is not a multiple killer; indeed, the jury did not even find he was the actual killer or that he intended to kill. (J.A. 28).

B. *ZANT* V. *STEPHENS* DOES NOT SAVE A DEATH SENTENCE THAT WAS THE PRODUCT OF THE SENTENCER'S CONSIDERATION OF A CONSTITUTIONALLY INVALID AGGRAVATING CIRCUMSTANCE AND WAS SUPPORTED BY OTHERWISE IRRELEVANT EVIDENCE PURSUANT TO A CAPITAL SENTENCING SCHEME IN WHICH THE SENTENCER IS SPECIFICALLY INSTRUCTED TO WEIGH STATUTORY AGGRAVATING CIRCUMSTANCES AGAINST MITIGATING CIRCUMSTANCES.

The Mississippi Supreme Court attempted to further distinguish *Maynard* v. *Cartwright* by holding that the invalidation of an aggravating circumstance would not require vacation of a death sentence so long as one remaining valid aggravating circumstance existed. *Clemons*, 535 So. 2d at 1363. The majority relied on and cited this Court's decision in *Zant* v. *Stephens*, 462 U.S. 862, 103 S. Ct. 2733 (1983) to reach this result. *Zant*, however, involved a capital sentencing scheme and facts materially different than those before the Mississippi Supreme Court in *Clemons*.

1. The Mississippi Capital Sentencing Scheme Requires The Jury To Weigh Aggravating Against Mitigating Circumstances In Exercising Its Discretion Whether To Impose The Death Penalty.

In *Zant*, the defendant was sentenced to death on the basis of three aggravating circumstances, one of which was later found

by the Georgia Supreme Court to be invalid. This Court held that the reference to the invalid statutory aggravating circumstance in the court's instructions did not require that the death sentence be set aside inasmuch as the evidence supporting the invalid aggravating circumstance was nonetheless properly admissible at the sentencing hearing.

This Court's opinion in *Zant* begins with the observation that in Georgia "unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance or to balance aggravating against mitigating circumstances pursuant to any special standard." 462 U.S. at 873-74, 103 S.Ct. at 2741 (footnote omitted). Thus, this Court concluded—based on the Georgia Supreme Court's analysis of its capital sentencing scheme—that "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Id.* at 874, 103 S.Ct. at 2741. The Court found that the Georgia scheme was constitutionally sufficient because it provided for "categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage." *Id.* at 879, 103 S.Ct. at 2744.

The Mississippi capital sentencing scheme differs materially from Georgia's for the reasons identified by this Court at the outset of its opinion in *Zant*. Under the Mississippi scheme, the sentencing jury is specifically instructed to weigh aggravating and mitigating circumstances against each other. *Cf. Barclay v. Florida*, 463 U.S. 939, 954, 103 S.Ct. 3418, 3427 (1983) ("Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances."). Under this system, a finding of each aggravating circumstance separately influences the weighing and balancing process. Thus, in Mississippi—in contrast to Georgia — aggravating circumstances play a central role in guiding the

sentencing jury in the exercise of its discretion in addition to their function of narrowing the class of persons convicted of murder who may receive the death penalty.

At the conclusion of the sentencing hearing in *Clemons*, the trial court instructed the jury on the Mississippi capital sentencing procedure. In accordance with Mississippi Code section 99-19-101, the trial court charged the jury that Clemons could not be sentenced to death "unless each juror finds beyond a reasonable doubt that the statutory aggravating circumstances outweigh the mitigating circumstances." (J.A. 16). The jury was provided with seven statutory mitigating factors, the last of which permitted consideration of any other matter "the jury deem to be mitigating on behalf of the defendant." (J.A. 25-26). On the aggravation side, the trial court permitted the jury to consider *only* two circumstances. The jury was instructed to:

> Consider only the following elements, if any, of aggravation in determining whether the death penalty should be imposed:
>
> (1) the capital offense was committed while the defendant was engaged in the commission of robbery and was committed for pecuniary gain;
>
> (2) the capital offense was especially heinous, atrocious or cruel.

(J.A. 25). The trial court also instructed the jury that it could not "consider any aggravating circumstance not specifically mentioned." (J.A. 23).

The jury was told at least *fourteen times* to weigh aggravating circumstances against mitigating circumstances. (J.A. 13, 18, 20-27). The jury was further instructed that it could not return a sentence of death unless the aggravating factors outweighed the mitigating factors. (J.A. 18, 20, 21, 23, 27). The court instructed the jury that a death sentence is not permissible solely upon the finding of a single aggravating circumstance —the jury must *further* find that any such aggravating circum-

stance is not outweighed by any mitigating circumstances. *Cf. Zant*, 462 U.S. at 873 n.12, 103 S.Ct. at 2741 n.12.

Zant does not address the issue that was before the Mississippi Supreme Court in *Clemons*. The dissent found the majority opinion's reliance on *Zant* to be a "red herring" and observed:

> The *Stephens* opinion tells us forthrightly it has no application to today's question.
>
> > [W]e do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.
>
> *Zant* v. *Stephens*, 462 U.S. at 890, 103 S.Ct. at 2750.

Clemons, 535 So. 2d at 1370 (Robertson, Prather, JJ., dissenting). Mississippi has precisely that type of capital sentencing scheme.

Other states with capital sentencing schemes that require the sentencer to weigh aggravating and mitigating circumstances have vacated death sentences that were based in part upon the finding of an invalid aggravating circumstance—regardless of whether the invalidity was based on the federal constitution *or* state law. *Williams* v. *State*, 274 Ark. 9, 621 S.W. 2d 686 (1981), *cert. denied*, 459 U.S. 1042, 103 S.Ct. 460 (1983); *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546 (1985) (applying Arkansas law); *State* v. *Biegenwald*, 96 N.J. 630, 477 A.2d 318 (1984); *State* v. *Davis*, 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988), *cert. denied*,____ U.S.____, 109 S.Ct. 849 (1989). The "common denominator" in each of these cases is a capital sentencing statute that "requires the jury to weigh the aggravating circumstances against the mitigating circumstances when it decides whether or not the death penalty should be imposed."

Clemons, 535 So. 2d at 1370 (Robertson, Prather, JJ., dissenting).

2. The Prosecution Used The Invalid Aggravating Circumstance As A Vehicle To Present Otherwise Irrelevant Evidence To The Sentencing Jury.

The Court's analysis in *Zant* did not end with "the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute." The Court found the evidence supporting the invalid aggravating circumstance was "nevertheless fully admissible at the sentencing phase," and thus "the effect the erroneous instruction may have had on a jury is therefore merely a consequence of the statutory label 'aggravating circumstance.'" *Zant*, 462 at 886, 888, 103 S.Ct. at 2747, 2749.[13]

In *Clemons*, the question of whether the federal constitutional error had an effect upon the jury's decision-making process must be answered differently. In urging the jury to impose the death penalty, the prosecution chose to argue the "especially heinous" aggravating circumstance to the virtual exclusion of the robbery circumstance. The record shows that the prosecution mentioned the robbery aggravating circumstance only twice, once in closing and once in rebuttal, and in each instance, gave it only abbreviated treatment. On the other hand, the lion's share of the prosecution's argument on aggravation was devoted to the "especially heinous" circumstance. In making this argument the prosecution both exploited the unconstitutional breadth of the "especially heinous, atrocious or cruel" language and sought to bring the case within it by

---

[13] This Court further held that the Georgia Supreme Court did not err "in its conclusion that the 'mere fact that some of the aggravating circumstances presented were improperly designated statutory' had 'an inconsequential impact on the jury's decision regarding the death penalty.' 250 Ga., at 100, 297 S.E.2d, at 4." *Zant*, 462 U.S. at 889, 103 S.Ct. at 2749.

reference to evidence that was pertinent to the sentencing decision only under the "especially heinous" circumstance.[14]

The prosecution's argument did not focus on any torturous conduct by the defendant that might have brought the case within the supposedly limiting *Coleman* construction of the especially heinous, atrocious or cruel aggravating circumstance. Instead, the argument was based on the premise that this murder *ipso facto* was "especially heinous." For example, after reciting various facts about the victim's life, the prosecution surmised that the victim probably would have accomplished much more "if it weren't for this senseless heinous atrocious and cruel murder." (R. 1168). In rebuttal, the prosecution emphasized to the jury that this crime satisfied the "especially heinous" aggravating circumstance because of the victim's personal characteristics and what the defendant did the next day:

> The other one I feel is that the crime was committed in a heinous, atrocious and cruel manner. Here you have a man twenty-four years of age, in the prime of life. A three year old child. Holding down two jobs. Trying to make it in this world as an honest, law abiding human being for his family. Trying to—aspiring to be a supervisor in another county and he gets killed by a man who says after he killed him, 'Some times it be that way.' Somes time it be that way. And then he goes home after he has killed him, after he had drank the beer that he bought with the money he stole, after he has eaten the pizza and he goes to bed. And he sleeps. He gets up the next day and he goes fishing. And his own psychologist comes here and tells you it doesn't really bother him that much because he doesn't really have a conscious like you do. That's what you are dealing with.

[14] Here, as in *Gathers* v. *South Carolina*, ____ U.S.____, 109 S.Ct. 2207 (1989), the prosecution relied heavily on much evidence relating to the character of the victim whose only conceivable relevancy to the sentencing phase was under the broadest possible construction of the "especially heinous" aggravating circumstance. *See infra*, pp. 25-26.

(R. 1192).[15]

The vice of this argument springs from the constitutional error involved—the failure of the court to give any narrowing construction of the "especially heinous" aggravating circumstance to the sentencing jury. Thus, the prosecution's characterizations of this crime as "gruesome," "horr[ible]," "cruel," "terrible" or even "ugly" do not set this crime apart from the norm of capital felonies. As this Court observed in *Godfrey* "[t]here is nothing in these few words that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428-29, 100 S.Ct. at 1764-65. Similarly, in *Maynard*, this Court stated: "[t]o say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" ____ U.S. at ____, 108 S.Ct. at 1859.

The prosecution also relied heavily on certain facts that would not have been relevant to the jury's sentencing decision

[15] Under a proper limiting construction of the "especially heinous" aggravating circumstance, events that occurred long after the crime had been completed would be clearly irrelevant. Thus, these facts, as well as those relating to victim characteristics, could not have been placed before the jury had such a limiting instruction been given. *See Barclay* v. *Florida*, 463 U.S. at 967, 103 S.Ct. at 3433-34 (Evidence must be relevant to character of defendant or circumstances of crime) (Stevens, J.,concurring). If, on the other hand, the prosecution was attempting to show that Clemons had not shown any consciousness of guilt by the next day, the argument is materially inaccurate, as Clemons voluntarily called the county sheriff and turned himself in to the authorities that day. (R. 1112). Regardless, since the jury did not find that Clemons "actually killed," or even "intended to kill," the finding of the "especially heinous" aggravating circumstance—with respect to Clemons—must have been based upon factors extraneous to the circumstances of the crime.

except under the indiscriminating sweep of the "especially heinous" aggravating circumstance. A substantial portion of the prosecution's "especially heinous" argument and rebuttal was spent focusing the jury's attention on otherwise irrelevant characteristics of the victim. For example, the prosecution urged to the jury to find the "especially heinous" aggravating circumstance based upon the victim's personality:

> You will have the pictures of Arthur Shorter as he appeared on the day of April the 17th. They don't depict exactly the personality of Arthur Shorter. Only those friends and people that knew Arthur Shorter can tell you whether he was a good person. But we can look at what Mr. Matthew Shorter told us of his son. That he worked two jobs. He had a degree from Alcorn University. He was striving to get a higher education. And he had a son, a three year old son.
>
> Of course, Mr. Shorter and Candy Shorter won't have their son any more. Mr. Shorter probably worked throughout his life. He is a retired pulpwood man as he told you. He has worked all of his life hard, raised fourteen children. And he has tried to instill in them the work ethic. And I think if you look at what he told you Arthur was doing, I think you can say that he properly instilled that work ethic in Arthur.
>
> Arthur worked hard at two jobs. And he had a degree from Alcorn University. And still worked at nights after he got off from M and M's butcher job that he had and worked at the Domino Pizza [sic.]. He was a young man twenty-four years of age. Just a few years younger, older rather, than the defendant, Chandler Clemons. But he had accomplished a lot and probably would have done more if it wasn't for this senseless heinous, atrocious and cruel murder.

(R. 1167-68).

The trial court instructed the jury that it could consider *only* two aggravating circumstances: "robbery" and "especially heinous, atrocious or cruel." Yet, because no narrowing construction of the latter circumstance was given, the prosecution was able to argue to the jury evidence in aggravation that

otherwise would have been irrelevant to the sentencing determination. In substance, the prosecution directed to the jury additional evidence of aggravation—evidence that otherwise had no conceivable bearing on the sentencing decision—through the vague and ever-shifting contours of Mississippi's "especially heinous" aggravating circumstance.

The prosecution's reliance on this circumstance must be viewed in light of its practical effect, which, as this Court has already indicated, fails to imply "any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1765. Thus, this case is the inverse of *Zant*: The effect of the constitutional error on the jury is *not* a consequence of the statutory label "aggravating circumstance," rather, this statutory label has an impermissible effect on the jury because it is, as this Court observed in *Maynard* and*Godfrey*, no "label" at all—it is so vague that is provides "no principled way to distinguish [the cases] in which the death penalty was imposed, from the many in which it was not."[16] *Godfrey*, 446 U.S. at 427, 100 S.Ct. at 1764. In the absence of a proper limiting construction, the prosecution is free to argue—and the jury to consider (as it did in this case)—evidence that would otherwise be irrelevant at the sentencing phase.[17] In contrast to *Zant*, the evidence the prosecutor urged the jury to consider in support of the "especially heinous" aggravating circumstance was *not* "fully admissible at the sentencing phase." *Zant*, 462 U.S. at 886, 103 S.Ct. at 2747. This

---

[16] Moreover, in contrast to the Georgia scheme at issue in *Zant*, the instruction in this case did place particular emphasis on the role of statutory aggravating circumstances in guiding the jury's exercise of discretion. For example, the jury was told that it could consider *only* the two statutory aggravating circumstances. (J.A. 25). The jury was also told repeatedly to weigh any aggravating factors it found against any mitigating factors. (J.A. 13, 18, 20-27).

[17] *See supra* pp. 22-26. This evidence included a detailed account of the victim's personal characteristics, history and family. Apart from its irrelevance to the "especially heinous" aggravating circumstance, this Court has recently held such evidence constitutionally impermissible in *Gathers* v. *South Carolina*, ____ U.S.____, 109 S.Ct. 2207 (1989).

Court as well as the Supreme Court of Georgia noted in *Zant* "that a different result might be reached if the failed circumstance had been supported by evidence not otherwise admissible or if there was reason to believe that, because of the failure, the sentence was imposed under the influence of an arbitrary factor." *Zant*, 462 U.S. at 873, 103 S.Ct. at 2739.

C. THE MISSISSIPPI SUPREME COURT'S REFUSAL TO REMAND THIS CASE FOR RESENTENCING BEFORE A JURY VIOLATES PETITIONER'S LIFE AND LIBERTY INTEREST GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Unlike many other states, Mississippi has placed the responsibility for making the life or death determination solely and exclusively with the jury. Even if the defendant waives a jury during the guilt phase of the trial or pleads guilty, "the sentencing proceeding *shall* be conducted before a jury impaneled for that purpose." Miss. Code Ann. § 99-19-101(1) (Supp. 1988) (emphasis added). The "jury *shall* deliberate on . . . ; (b) aggravating circumstances . . . ; (c) whether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist . . . ; (d) based on these considerations, whether the defendant should be sentenced to life imprisonment or death." Miss. Code Ann. § 99-19-101(2) (Supp. 1988) (emphasis added). Prior to imposing a sentence of death, the jury "*must unanimously* find in writing: . . . (b) that sufficient aggravating circumstances exist. . . ; and (c) that there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." Miss. Code Ann. § 99-19-101(3) (Supp. 1988) (emphasis added). Furthermore, the Mississippi statute requires that "[i]n each case in which the jury imposes the death sentence, the determination of the jury *shall* be supported by specific written findings of facts . . . *If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.*" *Id.* (emphasis added).

The Mississippi Supreme Court, in interpreting it capital-sentencing scheme, has never questioned the jury's absolute

power to impose the death penalty. The court has written: "That we have limited powers of appellate review in no way changes the fact that the primary and ultimate sentencing power is vested alone in the jury." *Id.* at 812. *See Wiley* v. *State*, 449 So. 2d 756, 762 (Miss. 1984); *Williams (Daniel)* v. *State*, No. DP-56 (Miss. June 21, 1989) (quoting *Williams (Walter)* v. *State*, 445 So. 2d 798 (Miss. 1984). The Mississippi Supreme Court has emphasized that the jury's decision in the sentencing phase is the "single most important stage of the process of determining whether the defendant will live or die." *Id.* at 811.

In *Gardner* v. *Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204 (1977), this Court stated that the capital "sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *See Skipper* v. *South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986). In *Hicks* v. *Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227 (1980) this Court held that "where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement." *Cabana* v. *Bullock*, 474 U.S. 376, 387 n.4, 106 S.Ct. 689, 697 n.4 (1986). The defendant in *Hicks* had been sentenced by the jury—as required by Oklahoma law—under a recidivist statue to a mandatory 40 year term. Subsequent to the conviction, this provision of the recidivist statute was determined unconstitutional by the Oklahoma appellate court in another case. Although the Oklahoma Court of Criminal Appeals acknowledged in *Hicks* that the mandatory feature of the recidivist statute was unconstitutional, it refused to remand for a new sentencing hearing, reasoning "that [Hicks] was not prejudiced by the impact of the invalid statute, because his sentence was within the range of punishment that could have been imposed in any event." This Court rejected this analysis, stating:

> Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a sub-

> stantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, *cf. Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. *See Vitek* v. *Jones*, 445 U.S. 480, 488-489, citing *Wolff* v. *McDonnell*, 418 U.S. 539; *Greenholtz* v. *Nebraska Penal Inmates*, *supra*; *Morrissey* v. *Brewer*, 408 U.S. 471.

447 U.S. at 346, 100 S.Ct. at 2229. This Court then reversed, finding a due process violation:

> In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

Id. (emphasis in original) (footnote omitted).

The denial of Clemons' right under the Due Process Clause to be sentenced by a jury in accordance with Mississippi law is no less arbitrary and much more serious than the violation in *Hicks*. The forceful and well-reasoned dissent below expressed the essence of the deprivation:

> The state law point first. The majority's bottom line is an expression of opinion about what it cannot know.
>
> * * *
>
> Once one aggravating circumstance is invalidated, no one can say whether that would—or would not—have altered the outcome of the jury's weighing and balancing process. Stripped of the weight of the 'especially heinous, atrocious or cruel' aggravating circumstance, we cannot sensibly say that the scales would—in the sentencing jury's perception—have tipped toward death.

Clemons, 535 So. 2d at 1369 (Robertson, Prather, JJ., dissenting). Beyond this fact, the dissent demonstrated that the

majority's "opinion" was—in view of the jury's exclusive power to sentence in capital cases—"without significance in law:"

> Legally, it is not this Court's opinion that counts, but the jury's. Under our law only a jury has power to impose a death sentence. Section 99-19-101(2) places upon the jury the balancing task.
>
> * * *
>
> A jury has to perform the weighing and balancing and then report in writing its findings. Without that written report, no person may lawfully be sentenced to death. Since one aggravating circumstance has been removed, the first jury's report should be held for naught and a new report sought.

Id. In a separate dissent, the presiding justice of the court wrote:

> The U.S. Supreme Court having determined, however, in *Maynard* v. *Cartwright*, 486 U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), that these words do not constitute a valid factor in the jury's determination, I am compelled to vote to reverse. That Court having stated the jury should not have considered these words, only the trial jury —and certainly not this Court—could answer whether the absence of this factor from their consideration would have made a difference.

Id. at 1367 (Hawkins, P.J. dissenting). The arbitrariness of the Mississippi court's refusal in *Clemons* to remand for resentencing by a jury is further demonstrated by one of its recent decisions involving the invalidation of a single aggravating circumstance.

In *Johnson* v. *Mississippi*, ____ U.S. ____, 108 S.Ct. 1981 (1988), this Court vacated the defendant's sentence of death based on the fact that one of the three aggravating circumstances relied upon by the jury was found to be constitutionally invalid. On remand, the Mississippi Supreme Court was required to determine whether to "(1) remand this cause to the circuit court of Pike County for another sentencing hearing, or (2) make the decision ourselves as to whether to reimpose the

death penalty or reduce Johnson's sentence to life because of the invalidation of this aggravating circumstance which was considered by the original trial jury." *Johnson* v. *State of Mississippi*, DP-43, slip op. at 2-3, (Miss. July 18, 1989).[18] Although Johnson's sentence of death was supported by two other valid aggravating circumstances, the Mississippi Supreme Court, in a six to one decision, remanded the case for resentencing before a jury. The Mississippi Supreme Court based its decision on the fact that "this [invalid] aggravating factor was considered by the Pike County trial jury, and argued by the State at trial as an additional reason for imposing the death sentence. *We cannot know what the sentence of that jury would have been in the absence of this aggravating circumstance.*" *Id.*, slip op. at 4 (emphasis added).

The Mississippi Supreme Court's decision to remand for resentencing in *Johnson* cannot be reconciled with its decision in *Clemons*. Both cases were decided under the same capital sentencing statute. In both cases the aggravating circumstances were declared invalid on federal constitutional grounds. In both cases the invalid aggravating circumstance was argued by the prosecution as an additional reason for imposing the death penalty. Yet, in *Clemons*, the Mississippi Supreme Court claimed that resentencing by a jury was unnecessary as the result would have been the same with or without the invalid aggravating circumstance.[19]

This conclusion is no different than the Oklahoma Criminal Court of Appeals' "conjecture" in *Hicks* that remand to a jury—in accordance with state law—was unnecessary because the same punishment might be imposed. However, because the

[18] A copy of this opinion has been lodged with the Clerk of this Court.

[19] Johnson, as the Mississippi Supreme Court noted, was convicted of being "an active participant, if indeed not the leader, in the deliberate, brutal slaying of a highway patrolman carrying out his duties." *Johnson*, slip op. at 3. In contrast, the jury did *not* find that Clemons "actually killed" or even "intended to kill." At the sentencing phase, Clemons presented a substantial number of other facts in mitigation. *See infra*. p. 35.

nature of Clemons' due process interest is more serious, the prejudicial effect of the Mississippi Supreme Court's decision is greater. Under Mississippi law, the life or death decision is made solely by the weighing and balancing of particular findings made by the jury regarding aggravating and mitigating circumstances. In this case, the original weighing process was upset by the jury's consideration of a constitutionally invalid aggravating circumstance. The Mississippi Supreme Court has no power or jurisdiction under state law to make those findings in lieu of the jury. As the Mississippi Supreme Court reiterated in *Johnson:*

> Under our law only a jury has power to impose a death sentence. Miss. Code Ann. § 99-19-101(2) (Supp. 1989). If a sentence of death may validly emanate only from the now familiar balancing process, then that process may only be performed by he who has authority to sentence. It may be true that there is no constitutional imperative that a death sentence may be imposed only by a jury, but it is surely mandated that responsibility for weighing and balancing the aggravating and mitigating circumstances be vested in that legal body which possesses the sentencing power.

Id., slip op. at 1-2. (Robertson, J., concurring). Rather than adhering to state law in *Clemons*, the Mississippi Supreme Court did what it expressly pledged not to do and what the Eighth and Fourteenth Amendments forbid: create "short cuts to the execution chamber." *Pinkton* v. *State*, 481 So. 2d 306, 310 (Miss. 1985).

D. THE MISSISSIPPI SUPREME COURT'S REFUSAL TO REMAND THIS CASE FOR RESENTENCING BEFORE A JURY VIOLATES THE PETITIONER'S RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO HAVE THE SENTENCER CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE.

The Mississippi Supreme Court's failure to remand for resentencing by a jury implicates more than just the petitioner's due process interests. In *Lockett* v. *Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978), this Court held that the Eighth and Fourteenth

Amendments require that "the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 98 S.Ct. at 2964-65 (footnotes omitted) (emphasis added); *Eddings* v. *Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982). Moreover, in *Penry* v. *Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 2947 (1989) this Court stated that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and *give effect* to that evidence in imposing sentence. *Hitchcock* v. *Dugger*, 481 U.S. 393, 107 S.Ct. 1821 (1987)." (Emphasis added).

The sentencing jury reached its decision in this case by finding two aggravating circumstances—one of which was constitutionally invalid and should not have been considered in the first place—and *weighing* them against the mitigating circumstances. The Supreme Court of Mississippi, however, focused exclusively on the aggravation side of the scale in saving the otherwise invalid sentence of death. Having found one aggravating factor to be invalid, the Mississippi Supreme Court simply held that "a remaining valid aggravating circumstance will nonetheless support the death penalty verdict." *Clemons*, 535 So.2d at 1362. The Mississippi Supreme Court did not give effect to the mitigating evidence presented to the sentencing jury by making factual and credibility determinations, and then reweighing aggravating and mitigating circumstances. Nor could it have done so for, under Mississippi practice, there is no way of knowing what factual findings in mitigation the jury made on the basis of petitioner's mitigating evidence.

Under Mississippi law, the jury must make specific findings in aggravation, but there is no similar requirement for mitigation—even if such circumstances are supported by the evidence and exist. (J.A. 25-26). Indeed, the verdict form in this case simply required the jury to find that any specific aggravating circumstances found "is/are sufficient to impose the death penalty that there are insufficient mitigating circumstance(s) to outweigh the aggravating circumstance(s) . . ." (J.A. 27). Thus, the jury's credibility and factual determinations in regard to mitigation are entirely subsumed in the weighing and balancing process.

An examination of the record shows that Clemons presented a substantial number of mitigating circumstances, all of which were supported by the evidence. Those circumstances include the following:

(a) Clemons' youth—he had turned eighteen only a week before this crime. (R. 1149); *see* Miss. Code Ann. § 99-19-101(6)(g).

(b) Clemons' lack of *any* prior criminal record or history. (R. 1113); *see* Miss. Code Ann. § 99-19-101(6)(a).

(c) Clemons has a chance of benefiting from a rehabilitation program. (R. 1135, 1153-54).

(d) Clemons' expression of remorse for his involvement in the crime (R. 1112-13).

(e) Clemons was a chronic abuser of alcohol and chemical substances. (R. 1115, 1124-25, 1149-51).

(f) Clemons was acting under the influence of drugs and alcohol at the time of the crime. (R. 1112).

(g) Clemons had suffered organic brain damage which impaired his judgment. (R. 1125); *see* Miss. Code Ann. § 99-19-101(6)(f).

(h) Clemons voluntarily turned himself in to the sheriff when he heard that they wanted to see him. (R 1112).

To give effect to the mitigating evidence presented to the sentencing jury, the Mississippi Supreme Court would have had to: 1) make its own credibility and factual findings regarding the mitigating evidence; and 2) independently assess the relative weights of the aggravating and mitigating circumstances it found. The majority did not, however, assess the

mitigating evidence; in fact, it did not even mention any of the mitigating evidence presented to the sentencing jury.[20] Instead, as noted above, the court affirmed on the basis of a single remaining aggravating factor. Moreover, in the absence of specific credibility and factual findings in mitigation by the sentencing jury, the Mississippi Supreme Court could not assess Clemons' mitigating evidence.

The Mississippi Supreme Court has consistently and repeatedly held that the jury alone finds facts, assesses credibility and determines the sentence in capital proceedings. Indeed, in *Clemons*, the Mississippi Supreme Court reaffirmed that it was not empowered to perform these functions: "The credibility of a witness is not for the reviewing court. . . . It was the function of the jury to pass upon the credibility of witnesses and to resolve the issues." *Clemons*, 535 So. 2d at 1359 (quoting *Johnson* v. *State*, 477 So. 2d 196, 207 (Miss. 1985), *cert. denied*, 476 U.S. 1109, 106 S.Ct. 1958 (1986), *rehearing denied*, 476 U.S. 1189, 106 S.Ct. 2930 (1986)) (citations omitted). In *Leatherwood (Michael)* v. *State*, 539 So. 2d 1378 (Miss. 1989), the court refused to put itself "in the position of circuit court jury, a result both unprovided for and unwise under our system." *Id.* at 1389. The court further emphasized that "[t]he circuit court jury sits as factfinder and sentencer, and it is that body, not this Court, which should make all of the credibility determinations that go along with the exercise of that duty. *See* Miss. Code

[20] In denying Clemons' claim that the State did not introduce sufficient evidence of aggravating circumstances to outweigh the mitigating circumstances, the Mississippi Supreme Court held flatly "the jury is the factfinder and, in the present case, found that the aggravating circumstances outweighed the mitigating circumstances presented by Clemons. This Court is bound by that finding of the jury." *Clemons*, 535 So. 2d at 1361 (citations omitted). If there was any doubt that the Mississippi Supreme Court affirmed the death sentence in *Clemons* on the basis of the single remaining aggravating factor, it was resolved in *Pinkney* v. *State*, *538 So. 2d 329 (Miss. 1988). In Pinkney*, the Mississippi Supreme Court cited *Clemons* for the proposition that a death sentence may stand "intact," so long as one remaining valid aggravating circumstance exists. *Id.* at 357. *See also Johnson* v. *State*, slip op. at 3.

Ann. §§ 99-19-101, 103 (Supp. 1988)." *Id.*; *see also Mhoon* v. *State*, 464 So. 2d at 81; *Pinkton* v. *State*, 481 So. 2d 306 (Miss. 1985); *Wiley* v. *State*, 449 So. 2d at 762; *Hall* v. *State*, 427 So. 2d 957, 960 n.3 (Miss. 1983) (appellate court does not make findings of fact on conflicting evidence); *Hill* v. *State*, 432 So. 2d 427, 439 (Miss. 1983), *cert. denied*, 464 U.S. 977, 104 S.Ct. 414 (1983) (jury verdict is last word to factual dispute). Thus, state law precludes the Supreme Court of Mississippi from engaging in the type of factual and credibility findings that are inherent in the weighing and balancing process.

Even in those cases where the Eighth Amendment permits appellate factfinding, this Court has acknowledged that such procedures might not be "adequate." In *Cabana* v. *Bullock*, 474 U.S. 376, 106 S.Ct. 689 (1986) this Court, in holding that the *Enmund* v. *Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), determination could constitutionally be made on appellate review, cautioned:

> There might be instances, however, in which the *[Sumner]* presumption would not apply to appellate factfinding regarding the *Enmund* criteria because appellate factfinding procedures were not 'adequate,' see 28 U.S.C. § 2254(d)(2). For example, the question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record, *cf. Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985); *Wainwright* v. *Witt*, 469 U.S. 412, 429 (1985).

474 U.S. at 388 n.5, 106 S.Ct. at 698 n.5. *Cabana* did not address the type of appellate factfinding and credibility determinations at issue in this case. As this Court stated: "The determination whether the death sentence is permissible under *Enmund* is different in a significant respect both from the general exercise of sentencing discretion and from the type of Eighth Amendment proportionality inquiry undertaken in *Solem* v. *Helm*. The latter two determinations typically involve case-by-case, totality-of-the-circumstances decisionmaking." *Cabana*, 474 U.S. at 386, 106 S.Ct. at 697. This difference is

significant, because, as this Court further noted, "[a] new hearing devoted to the identification and weighing of aggravating and mitigating factors is thus, as far as we are concerned, unnecessary." *Id.* at 392, 106 S.Ct. at 700. These distinctions recognize that the type of fact and credibility finding inherent in the weighing and balancing process must be performed at the trial court level to satisfy the standard of reliability required by the Eighth Amendment. *Lockett* v. *Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964 ("we are satisfied that this qualitative difference between death and other penalties calls for a greater degree or reliability when the death sentence is imposed.") As this Court explained in *Caldwell* v. *Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985):

> [A]n appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.'

Id. at 330, 105 S.Ct. at 2640.

There are numerous practical reasons why this is so. This Court has repeatedly held that the sentencer "must make an '*individualized* determination' of whether the defendant should live or die, based upon 'the character of the individual and the circumstances of the crime.'" *Booth* v. *Maryland*, 482 U.S. 496, 502, 107 S.Ct. 2529, 2532 (1987) (quoting *Zant*, 462 U.S. at 879, 103 S.Ct. at 2744) (emphasis in original); *Eddings* v. *Oklahoma*, 455 U.S. at 112, 102 S.Ct. at 875. This determination cannot be made on the basis of a cold, paper record, particularly where, as in this case, the jury is not required to specify in writing its fact and credibility determinations with respect to mitigation. As this Court stated in *Caldwell:* "When we held that a defendant has a constitutional right to the consideration of such factors, *Eddings, supra; Lockett, supra,*

we clearly envisioned that that consideration would occur among sentencers *who were present to hear the evidence and arguments and see the witnesses.*" 472 U.S. at 330-31, 105 S.Ct. at 2640 (emphasis added).

It is the trial court that has heard the testimony, assessed the credibility and demeanor of the witnesses, laid eyes on the defendant and has determined the appropriate weight to assign to each. The same is not true for an appellate court, which, as the Supreme Court of Mississippi conceded is:

> ill equipped to find facts. Pragmatically speaking it is essential that we have from our trial courts findings of fact upon which we may rely, for, if we had to find the facts anew in every case coming before us, we would become even further bogged down in the dispatch and management of our caseload. Beyond that, even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. *The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.*

Gavin v. *State*, 473 So. 2d 952, 955 (Miss. 1985) (citations omitted) (emphasis added). Thus, to insure the standard of reliability in the capital sentencing process that is required by the Eighth Amendment, the trial court—whether it be the judge or the jury—must in the first instance make the fact and credibility determinations that are central to the weighing and balancing of aggravating and mitigating circumstances.[21]

---

[21] Nothing in *Spaziano* v. *Florida*, 468 U.S. 447, 104 S.Ct. 3154 (1984) is inconsistent with this view of the Eighth Amendment. In *Spaziano* this Court held that the Constitution does not require the jury—as opposed to the trial judge—to perform the weighing and balancing function. Indeed, the majority found that the "jury's role as a link between the community and the penal system and as a bulwark between the accused and the State . . . is not . . . inconsistent with a scheme in which the imposition of the penalty in individual cases is determined by a judge." *Id.* at 462-63, 104 S.Ct. at 3163. That link, however, does not empower an appellate court such as the Supreme Court of Mississippi—geographically and administratively far removed from the community—to make credibility and factual findings, and then indepen-

Two unconstitutional procedures—one in which the jury's weighing of aggravating against mitigating circumstances is skewed by the inclusion of a constitutionally impermissible aggravating circumstance, and another in which an appellate court upholds the sufficiency of the remaining aggravating circumstance alone without considering evidence in mitigation —do not add up to one constitutional proceeding. Petitioner is entitled under the Eighth and Fourteenth Amendments to a new sentencing hearing before a jury — the only body authorized under Mississippi law to receive evidence and testimony in mitigation, to judge its credibility, to assess its weight and to perform the critical weighing and balancing of aggravating and mitigating factors in accordance with the Mississippi capital sentencing scheme.

E. THE CONSTITUTIONAL ERROR IN THE SENTENCING PHASE OF THIS CASE WAS NOT HARMLESS UNDER THE CHAPMAN AND SATTERWHITE STANDARD.

The majority below did not state that it was applying a harmless error analysis to the constitutionally invalid aggravating circumstance; nor did it cite to or rely upon any of this Court's harmless error precedents in affirming the death sentence in this case. *See, e.g., Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824 (1967). Nevertheless, even if the majority's decision could be construed as holding that the jury's consideration of the constitutionally invalid aggravating circumstance was harmless error, this Court still must vacate the death sentence on the ground that the Mississippi Supreme Court misapplied the harmless error test to the facts of this case.

---

dently reweigh the aggravating and mitigating circumstances. Had the sentencing jury in this case made written findings with respect to mitigation, thereby expressing objectively its views on the evidence and the credibility of the witnesses, *cf., Baldwin* v. *Alabama*, 472 U.S. 372, 376, 379 n.5, 105 S.Ct. 2727, 2728, 2731 n.5 (1985); *Barclay* v. *Florida*, 463 U.S. at 944-45, 103 S.Ct. at 3422, *and* if the law of Mississippi did not reserve the capital sentencing determination exclusively to the jury, perhaps a different result would be permissible.

In *Satterwhite* v. *Texas*, ___ U.S. ___, 108 S.Ct. 1792, 1794 (1988), this Court cautioned that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given the the sentencer." Nevertheless, this Court found that the harmless error rule, as announced in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824 (1967), applied to certain constitutional errors in the sentencing phase of a capital case. This Court stated: "The question . . . is . . . whether the state has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Chapman*, 386 U.S. at 24, 875 S. Ct. at 828." *Satterwhite*, ___ U.S. at ___, 108 S.Ct. at 1798.

The majority below concluded, "beyond a reasonable doubt," that "the jury's verdict would have been the same with or without the especially heinous, atrocious or cruel aggravating circumstance." *Clemons*, 535 So. 2d at 1364. If this is to be construed as a harmless error ruling, then it is inconsistent with *Satterwhite*, incompatible with the evidence presented at the sentencing hearing and cannot withstand the type of scrutiny the Eighth Amendment requires. *See California* v. *Ramos*, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 3452 (1983) (the qualitative difference of death from all other punishments requires correspondingly greater degree of scrutiny of capital sentencing determination).

In *Johnson (Samuel Bice)* v. *Mississippi*, 511 So. 2d 1333 (Miss. 1987), the Mississippi Supreme Court "eschew[ed]" harmless error in affirming a death sentence based upon two remaining valid aggravating circumstances "because the district attorney argued this particular [invalid] aggravating circumstance as a reason to impose the death penalty." 511 So. 2d at 1338. This Court in turn noted that the Mississippi Supreme Court's refusal to "rely on the harmless-error analysis . . . on the facts of this case . . . was plainly justified." *Johnson* v. *Mississippi*, ___ U.S. ___, 108 S. Ct. at 1988-89. This Court observed, as did the Mississippi Court, that the invalid

aggravating circumstance was "vigorously argued to the jury as a basis for imposing the death sentence." ___ U.S. at ___, 108 S.Ct. at 1989 n.8. In a case decided two weeks earlier, this Court also found the harmless-error analysis inappropriate where the district attorney "highlighted" constitutionally illegal evidence in closing argument to the sentencing jury. *Satterwhite* v. *Texas*, ___ U.S.___, 108 S.Ct. 1792 (1988).

In this case, the especially heinous aggravating factor was not merely "highlighted," but became the centerpiece of the prosecution's closing argument. As noted above, the especially heinous aggravating circumstance was argued to the jury to the virtual exclusion of the other aggravating circumstance. *See supra*, pp. 22-27. If, as this Court found, the Mississippi Supreme Court was "plainly justified" in eschewing harmless error analysis in *Johnson*, certainly no less can be said about its inappropriateness in this case.

As noted earlier, petitioner presented substantial mitigating evidence which is nowhere mentioned in the opinion of the Mississippi Supreme Court. *See supra*, p. 35. The Mississippi Supreme Court failed to acknowledge, let alone address, these mitigating circumstances in affirming the death sentence on the basis of the single remaining valid aggravating circumstance. Equally significant is the absence of any discussion regarding the sentencing jury's *Enmund* finding and the court's earlier decision in *Bullock* v. *State*, 525 So. 2d 764 (Miss. 1987).

At trial, the prosecution contended, based upon the testimony of a "cooperating" co-defendant, that Clemons shot the victim. Clemons denied that he shot the victim. The jury resolved this factual and credibility dispute in Clemons' favor by refusing the find that he "actually killed" or "intended to kill" the victim. Instead, the jury found that Clemons "contemplated that lethal force would be employed."[22] (J.A. 28). In

[22] This finding is not inconsistent with the statutory mitigating circumstance that "the defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor." Miss. Code Ann. § 99-19-101(6)(d)(Supp. 1988).

Bullock, defendant was convicted of capital murder in 1979. The sentencing jury, in imposing the death sentence, found two aggravating factors. After years of appeals and post-conviction proceedings, the Mississippi Supreme Court, on remand from this Court, found under *Enmund* that the defendant only "contemplated that lethal force would be used." Although the *Enmund* criteria had been minimally satisfied, the Mississippi Supreme Court chose to impose a life sentence, explaining "when you review all of the other capital cases decided since *Bullock* [v. *State*, 391 So. 2d 601 (Miss. 1980)], no capital defendant has had a death sentence affirmed in this state where the sole finding was that he contemplated lethal force."[23] 525 So. 2d at 770.

Putting aside the issue of disproportionality, it is difficult to understand, in view of *Bullock*, how the Mississippi Supreme Court could come to a conclusion in *Clemons* that the sentencing jury's consideration of the constitutionally invalid "especially heinous" aggravating circumstance could be harmless-error. This lack of consistency is exacerbated by the fact that the prosecution relied heavily on this aggravating circumstance in urging the death penalty, that Clemons presented substantial evidence of countervailing mitigating circumstances and that the Mississippi Supreme Court, as it candidly admitted in *Johnson* "cannot know what the sentence of [the] jury would have been in the absence of the [invalid] aggravating circumstance." Slip op. at 4. All of these factors point to only one conclusion: The State has not proved beyond a reasonable doubt, and therefore the Mississippi Supreme Court would have been incorrect in holding, that "the error complained of did not contribute to the verdict obtained." *Satterwhite*, ___ U.S. at ___, 108 S.Ct. at 1798.

[23] The sentencing juries in both *Bullock* and *Clemons* found the same two circumstances ("robbery" and "especially heinous") in aggravation. *Bullock*, 525 So. 2d at 774; *Clemons*, 535 So. 2d at 1367.

CONCLUSION

For all the foregoing reasons, the judgment of the Mississippi Supreme Court should be reversed, and petitioner's death sentence should be vacated.

Respectfully submitted,

KENNETH S. RESNICK
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200
Counsel of Record for Petitioner Chandler Clemons

Of Counsel:
M. GABRIELLE HILS
CLAIRE GRANDPRE COMBS
Dinsmore & Shohl
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202

APPENDIX

APPENDIX A
MISSISSIPPI CODE § 97-3-19

§ 97-3-19. Homicide; murder defined; capital murder.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriffs of counties and their deputies, constables, marshals and policemen of cities and town game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his dep-

uties, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use of detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

MISSISSIPPI CODE § 99-19-101

SEPARATE SENTENCING PROCEEDING TO DETERMINE PUNISHMENT IN CAPITAL CASES

99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the state of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which

outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or non-consensual/unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

MISSISSIPPI CODE § 99-19-103

§ 99-19-103 Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury' failure to agree on punishment.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-10-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

MISSISSIPPI CODE § 99-19-105

§ 99-19-105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition

to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated from consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(7) Upon affirmance, and again upon rehearing if such is necessary, of any sentence of death by the Mississippi Supreme Court of the affirmance or denial of review by the United States Supreme Court, the Mississippi Supreme Court shall reset the date of execution not more that sixty (60) days from the date of the Mississippi Supreme Court's affirmance of the sentence or from the denial of relief by the United States Supreme Court. Unless the sentence is suspended, the Clerk of the Mississippi Supreme Court shall forthwith deliver to the Commissioner of Corrections a warrant of execution under seal of the court, which warrant shall be his authority to execute the convict.

APPENDIX B

CAPITAL CASES TRIED SUBSEQUENT TO THE EFFECTIVE DATE OF MISS. CODE ANN. § 99-19-101 (1977), AND REVIEWED BY THE MISSISSIPPI SUPREME COURT.

Cases in which the jury found the "especially heinous, atrocious or cruel" aggravating circumstance:

1. *Billiot* v. *State*, 454 So. 2d 445, 466 (Miss. 1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1232 (1985).
2. *Booker* v. *State*, 449 So. 2d 209, 220-21 (Miss. 1984), *cert. denied*, 469 U.S. 873, 105 S.Ct. 230 (1984), *cert. granted and judgment vacated*, 472 U.S. 1023, 105 S.Ct. 3493 (1985).
3. *Bullock* v. *State*, 525 So. 2d 764, 774 (Miss. 1987).
4. *Cabello* v. *State*, 471 So. 2d 332, 349 (Miss. 1985).
5. *Caldwell* v. *State*, 443 So. 2d 806, 814 (Miss. 1983), *cert. granted*, 469 U.S. 879, 105 S.Ct. 243 (1984), *rev'd in part*, 472 U.S. 320, 105 S.Ct. 2633 (1985).
6. **Cannaday* v. *State*, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 469 U.S. 1221, 105 S.Ct. 1209 (1985).
7. *Clemons* v. *State*, 535 So. 2d 1354, 1361-62 (Miss. 1988), *cert. granted in part*, ___ U.S. ___, 109 S.Ct. 3184 (1989).
8. *Cole* v. *State*, 525 So. 2d 365, 374 (Miss. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 330 (1988).
9. **Culberson* v. *State*, 379 So. 2d 499, 508-09 (Miss. 1979), *cert. denied*, 449 U.S. 986, 101 S.Ct. 406 (1980).
10. **Davis (Gregory)* v. *State*, No. DP-86 (Miss. July 26, 1989).
11. *Davis (Danny Ray)* v. *State*, 512 So. 2d 1291, 1292 (Miss. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1088 (1988).
12. *Dufour* v. *State*, 453 So. 2d 337, 347 (Miss. 1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1231 (1985).

13. **Dycus* v. *State*, 440 So. 2d 246 (Miss. 1983).
14. *Edwards (Hezekiah)* v. *State*, 441 So. 2d 84, 90-92 (Miss. 1983).
15. *Evans* v. *State*, 422 So. 2d 737, 746 (Miss. 1982), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111 (1983).
16. *Faraga* v. *State*, 514 So. 2d 295, 309 (Miss. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2858 (1988).
17. *Fisher* v. *State*, 481 So. 2d 203, 211 (Miss. 1985).
18. **Fuselier* v. *State*, 468 So. 2d 45 (Miss. 1985).
19. *Gilliard* v. *State*, 428 So. 2d 576, 586 (Miss. 1983), *cert. denied*, 464 U.S. 867, 104 S.Ct. 40 (1983).
20. **Gray (David)* v. *State*, 472 So. 2d 409 (Miss. 1985), *cert. granted*, 475 U.S. 1010, 106 S.Ct. 1182 (1986), *rev'd in part*, 481 U.S. 648, 107 S.Ct. 2045 (1987).
21. *Gray (Jimmy Lee)* v. *State*, 375 So. 2d 994, 1003-04 (Miss. 1979), *cert. denied*, 446 U.S. 988, 100 S.Ct. 2975 (1980).
22. *Griffin* v. *State*, No. DP-68 (Miss. Aug. 10, 1989).
23. *Hill* v. *State*, 432 So. 2d 427, 443 (Miss. 1983), *cert. denied*, 464 U.S. 977, 104 S.Ct. 414 (1983).
24. **Houston* v. *State*, 531 So. 2d 598 (Miss. 1988).
25. *Irving* v. *State*, 441 So. 2d 846, 849 (Miss. 1983), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1774 (1985)
26. *Johnson (Edward Earl)* v. *State*, 416 So. 2d 383, 393 (Miss. 1982).
27. **Johnson (Leon)* v. *State*, 476 So. 2d 1195 (Miss. 1985).
28. *Johnson (Samuel Bice)* v. *State*, 511 So. 2d 1333, 1337 (Miss. 1987), *cert. granted in part*, ___ U.S. ___, 108 S.Ct. 693 (1988), *rev'd.*, ___ U.S. ___, 108 S.Ct. 1981 (1988).
29. **Jones (Gregory)* v. *State*, 461 So. 2d 686 (Miss. 1984), *appeal after remand*, 517 So. 2d 1295 (Miss. 1987), *cert.*

granted and judgment vacated, ___ U.S. ___, 108 S.Ct. 2891 (1988).

30. *Jones (Larry)* v. *State*, 381 So. 2d 983, 994-95 (Miss. 1980), *cert. denied*, 449 U.S. 1003, 101 S.Ct. 543 (1980).

31. *Jordan* v. *State*, 464 So. 2d 475, 478 (Miss. 1985), *cert. granted and judgment vacated*, 476 U.S. 1101, 106 S.Ct. 1942 (1986).

32. *King* v. *State*, 421 So. 2d 1009, 1018 (Miss. 1982), *cert. denied*, 461 U.S. 919, 103 S.Ct. 1903 (1983).

33. *Lanier (Johnny Rufus)* v. *State*, 533 So. 2d 473, 476 (Miss. 1988).

34. **Leatherwood (Alfred)* v. *State*, No. DP-70 (Miss. July 19, 1989).[1]

35. *Leatherwood (Michael)* v. *State*, 435 So. 2d 645 (Miss. 1983), *cert. denied*, 465 U.S. 1084, 104 S.Ct. 1455 (1984).

36. *Lockett* v. *State*, 517 So. 2d 1317, 1335 (Miss. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2858 (1988).

37. **Lockett* v. *State*, 517 So. 2d 1346 (Miss. 1987).

38. *Mhoon* v. *State*, 464 So. 2d 77, 84 (Miss. 1985).

39. *Minnick* v. *State*, No. DP-79, slip op. at 35-36 (Miss. Dec. 14, 1988).

40. **Moffett* v. *State*, 456 So. 2d 714 (Miss. 1984).

41. *Neal* v. *State*, 451 So. 2d 743, 763 (Miss. 1984), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 607 (1984).

42. *Nixon* v. *State*, 533 So. 2d 1078, 1084 (Miss. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 2458 (1989).

---

[1] Alfred Leatherwood was sentenced to die for capital rape, not involving the death of the victim or the use of a weapon. The "especially heinous, atrocious or cruel" aggravating circumstance was the only aggravating circumstance found by the jury.

43. *Pinkney* v. *State*, 538 So. 2d 329, 357 (Miss. 1988), *petition for cert. filed*, (May 12, 1989).

44. *Pruett* v. *Thigpen*, 665 F.Supp. 1254, 1273 (N.D. Miss. 1986), *aff'd*, 805 F.2d 1032 (5th Cir. 1986), *cert. denied*, 481 U.S. 1033, 107 S.Ct. 1964 (1987); *Pruett* v. *State*, 431 So. 2d 1101 (Miss. 1983), *cert denied*, 464 U.S. 865, 104 S.Ct. 201 (1983).

45. *Reddix* v. *State*, 381 So. 2d 999, 1013 (Miss. 1980), *cert. denied*, 449 U.S. 986, 101 S.Ct. 408 (1980), *habeas corpus granted*, *Reddix* v. *Thigpen*, 554 F. Supp. 1212 (S.D. Miss 1983), *rev'd in part*, 728 F.2d 705 (5th Cir. 1984), *rehearing denied*, 732 F.2d 494 (5th Cir. 1984), *cert. denied*, 469 U.S. 990, 105 S.Ct. 397 (1984).

46. **Smith (Grady)* v. *State*, 499 So. 2d 750 (Miss. 1986).

47. *Smith (Willie Albert)* v. *State*, 419 So. 2d 563, 568 (Miss. 1982), *cert. denied*, 460 U.S. 1047, 103 S.Ct. 1449 (1983).

48. **Stringer (James R.)* v. *State*, 454 So. 2d 468, 479 (Miss. 1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1231 (1985).

49. *Stringer (Jimmy Michael)* v. *State*, 500 So. 2d 928, 944 (Miss. 1986).

50. *Tokman* v. *State*, 435 So. 2d 664, 670 (Miss. 1983), *cert. denied*, 467 U.S. 1256, 104 S.Ct. 3547 (1984).

51. *Voyles* v. *State*, 362 So. 2d 1236, 1244 (Miss. 1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2184 (1979).

52. *Washington* v. *State*, 361 So. 2d 61, 65 (Miss. 1978), *cert. denied*, 441 U.S. 916, 99 S.Ct. 2016 (1979).

53. **West (Otha Lee)* v. *State*, 485 So. 2d 681 (Miss. 1986), *cert. denied*, 479 U.S. 983, 107 S.Ct. 570 (1986).

54. **West (Tony Wells)* v. *State*, 463 So. 2d 1048 (Miss. 1985).

55. *Wheat* v. *State*, 420 So. 2d 229, 241 (Miss. 1982), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1507 (1983).

56. **White* v. *State*, 532 So. 2d 1207 (Miss. 1988).

57. *Wilcher* v. *State*, 448 So. 2d 927, 940 (Miss. 1984), *cert. denied*, 469 U.S. 873, 105 S.Ct. 231 (1984).

58. **Wilcher* v. *State*, 455 So. 2d 727 (Miss. 1984).

59. **Wiley* v. *State*, 449 So. 2d 756 (Miss. 1984).

60. *Wiley* v. *State*, 484 So. 2d 339, 352 (Miss. 1986), *cert. denied*, 479 U.S. 906, 107 S.Ct. 304 (1986).

61. **Williams (Jessie Derrell)* v. *State*, No. DP-56 (Miss. Oct. 7, 1987).

62. *Williams (Walter)* v. *State*, 445 So. 2d 798, 815 (Miss. 1984), *cert. denied*, 469 U.S. 1117, 105 S.Ct. 803 (1985).

63. **Williamson* v. *State*, 512 So. 2d 868 (Miss. 1987).

64. *Woodward* v. *State*, 533 So. 2d 418, 434 (Miss. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 1767 (1989).

Cases in which the jury did not find the "especially heinous, atrocious or cruel" aggravating circumstance:

65. *Coleman* v. *State*, 378 So. 2d 640, 649 (Miss. 1979).

66. **Lanier (Arthur Ray)* v. *State*, 450 So. 2d 69 (Miss. 1984).

67. *Pinkton* v. *State*, 481 So. 2d 306, 308 (Miss. 1985).

68. **West (Tony Wells)* v. *State*, 519 So. 2d 418 (Miss. 1988).

Cases where the jury was not instructed to consider the "especially heinous, atrocious or cruel" aggravating circumstance:

69. **Edwards (Leo E.)* v. *State*, 413 So. 2d 1007 (Miss. 1982), *cert. denied*, 459 U.S. 928, 103 S.Ct. 239 (1982).

70. **Laney* v. *State*, 421 So. 2d 1216 (Miss. 1982).

71. *Mease* v. *State*, 539 So. 2d 1324 (Miss. 1989).

*The "especially heinous, atrocious or cruel" aggravating circumstance is not specifically mentioned in the reported decision by the Mississippi Supreme Court. Certified copies of the jury verdict or the judgment in these cases have been lodged with the Clerk of this Court.